

214493

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 34734

NORTHEAST INTERCHANGE RAILWAY, LLC -- LEASE AND OPERATION
EXEMPTION -- LINE IN CROTON-ON-HUDSON, NEW YORK

REPLY OF NORTHEAST INTERCHANGE RAILWAY, LLC TO "PETITION OF
THE VILLAGE OF CROTON-ON-HUDSON TO REJECT NOTICE OF EXEMPTION
OR, IN THE ALTERNATIVE, FOR STAY OF EFFECTIVENESS"

James E. Howard
One Thompson Square
Suite 201
Charlestown, MA 02129
Tel. No. 617-886-9322

Attorney for Northeast Interchange Railway, LLC

Dated: August 4, 2005

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 34734

REPLY OF NORTHEAST INTERCHANGE RAILWAY, LLC TO "PETITION OF
THE VILLAGE OF CROTON-ON-HUDSON TO REJECT NOTICE OF EXEMPTION
OR, IN THE ALTERNATIVE, FOR STAY OF EFFECTIVENESS"

The Village of Croton-on-Hudson, New York (the "Village") has requested the Board to reject the Notice of Exempt Transaction filed on August 1, 2005 by Northeast Interchange Railway, LLC ("NIR") in accordance with 49 CFR 1150.31. Contrary to the allegations of the Village, the Notice was not false or misleading, and there is no other basis for rejection or delay. NIR has properly followed the class exemption regulations intended by the Board to permit the creation of new rail carriers without unnecessary regulatory oversight. More importantly, and contrary to the allegations of the Village, NIR is not attempting to abuse the processes of the Board.

The Village urges the Board either to reject the Notice or to stay its effectiveness so that other interested parties can submit additional information. Although not required by the regulations, the Village was served by NIR with the Notice, and the Village has provided the Board with considerable information, albeit much of it incorrect, as demonstrated below. An examination of each of the contentions of the Village shows persuasively that additional information is unnecessary and that the Notice should be permitted to become effective as scheduled.

The Notice Does Not Contain False Information.

The Village notes that the license, issued by the New York State Department of Environmental Conservation ("DEC") to the current lessee of the line and property which will be acquired by NIR, cannot be assigned without the consent of DEC. NIR never alleged that the license could be transferred without such consent. Furthermore, the process of transferring DEC permits is straightforward and generally not controversial. Whether or not the license is transferred, NIR has represented that it will operate its property and rail line in accordance with the license and other applicable regulations of DEC.

The Village has gratuitously asserted that other unnamed affiliates of Regus Industries, the parent of NIR, allegedly have "poor operating records" and "numerous violations" at other unspecified locations. Contrary to such allegations, Regus and its affiliates have never been found to be in contempt of any orders of regulatory agencies. Surely, however, even if true (which it is not) the allegation by the Village cannot be a false statement concerning the operations of NIR, a new rail carrier.

The Village contends that the projected revenue of NIR will exceed \$5 million annually and claims, incorrectly, that the certificate required by 49 CFR 1150.33(g) was not provided. While the certificate of revenues was mislabeled (the summary notice was referred to in the text of the Notice as Exhibit C and the certification was referred to as Exhibit B, but the attachments themselves reversed the labeling), the certificate was in fact provided. Furthermore, the Village has projected revenues of over \$9 million annually based upon an affidavit by an employee of Metro. The revenues of NIR will be comprised of freight revenue charges for moving rail freight cars to the interchange with

CSX. Based upon the assumption that the number of rail cars in the first year or so of operation will be substantially the same as the number of rail cars at the site in prior years, and using a reasonable projection of revenue per car, the total revenue projected for NIR is well below \$5 million annually.

The Village contends that the verification of the Notice signed by Andreas Gruson, the chief executive officer of NIR, was false because it was signed on July 26, 2005 and the Notice was dated July 29, 2005. Mr. Gruson in fact signed his verification page on July 26 and dutifully thereafter reviewed and approved changes to the Notice prior to its submission to the Board. Only the logistics of preparing, signing and filing a document with counsel and parties in different cities prevented the verification from being signed on the same day as the petition was dated. In any event, Mr. Gruson reaffirms as of July 29, 2005 the verification he made on July 26, 2005.

Taking the phrase "there will be no significant changes" out of the context in which it was stated in the Notice--as part of the discussion of the lack of environmental impacts--the Village argues that the Notice is false because it is designed to prevent the Village from closing Metro's operations. To the contrary, however, the intention of the notice is to enable NIR to initiate operations as a rail carrier. Furthermore, the decision of the New York Court of Appeals did not technically give the Village the "right to close" the Metro facility, as the Village contends. Rather, the decision confirmed the right of the Village not to renew a special use zoning permit when the permit expired. The question whether the Village could prohibit Metro from operating, if it continued to lease and operate at the property in Croton-on-Hudson, remains unanswered and, more

importantly, beside the point with respect to the issue whether the Notice should become effective as scheduled.

The last in the litany of alleged false statements is that NIR provided an incorrect address. While the mailing address of NIR for service of process as shown in the records of the Secretary of State of New York is West Seneca, New York, which is the location of Regus Industries, the physical location of the property and line in Croton-on-Hudson is correct. The regulations do not specify whether applicants should show mailing addresses or actual operating locations.

The Notice Did Not Contain Misleading Information.

The Village argues that NIR misleadingly characterized its rail transportation operations as transloading rather than "processing" waste. According to the Village, the "processing" consists of trucks dumping waste onto the floor of the facility, inspecting the material for unacceptable or recyclable waste, crushing the waste and loading it into a rail car. As the Board is well aware, transloading is a classic example of rail transportation. Moreover, most transloading involves the transfer of commodities from trucks to rail cars. A degree of sorting and crushing of the commodity between a truck and a rail car surely does not convert transloading into a non-rail transportation activity.

Contrary to the allegation of the Village, NIR will not actually be a shipper of waste by rail. Rather, the trucking companies that bring waste to the NIR line for loading into rail cars will be the shippers, and NIR will be the rail carrier.

The Notice was Adequate.

The Village complains that the Notice is inadequate because there are no details concerning the lease with the owner of the line and property and no specific time frame as to when NIR will become a rail carrier. Details of such leases are not the type of information required by the class exemption regulations, nor do they inform the Board about any of the relevant issues. With respect to the time frame for NIR becoming a rail carrier, that is the purpose of the Notice; NIR will be a carrier when the Notice becomes effective and it begins its rail operations.

The Village also argues that construction of additional tracks by NIR to serve new customers in addition to construction and demolition waste customers is likely to exceed the thresholds in the environmental regulations. This argument is based upon sheer speculation and should be rejected. NIR has assumed, quite properly, that there will be the same level of rail activity for waste transloading as there has been in recent years. Consequently, there will be no increase over any of the environmental energy or air quality thresholds. Moreover, it is currently not feasible to predict future volumes and commodities in addition to the waste transloading. When NIR constructs additional tracks and attracts new business, there will be an opportunity for NIR, the Board and interested parties to address the question whether an environmental review is warranted. Suffice it to say that no such review is appropriate at this time.

The Line of NIR Will Be Subject to the Jurisdiction of the Board.

The Village argues that NIR's line will be a spur that is not subject to the jurisdiction of the Board. The Board has rejected such an argument in other situations in

which new rail carriers acquire lines that were previously not subject to the Board's jurisdiction. In those cases, the Board has recognized that the class exemption procedures may properly be used to acquire such a line and that the acquisition, in effect, converts the exempt line into one that is subject to the jurisdiction of the Board. In particular, if there is a significant change in use of the line, such as in this case with the change from a industry owned and operated sidetrack to a line of railroad operated by a common carrier and available to serve multiple customers, and if the line acquired constitutes the entire line of the new rail carrier, the Board has found the use of the class exemption notice procedure to be appropriate. See, for example, Arkansas Central Railway Company, Inc.--Operation Exemption--Line of Herzog Stone Products, Inc., Finance Docket No. 31405 (ICC served May 31, 1989); Yolo Shortline Railroad Company--Acquisition and Operation Exemption--County of Sacramento, California, Finance Docket No. 34018 (STB served March 27, 2001); and Texas Central Business Lines Corp.--Operation Exemption--Mid Texas International Center, Finance Docket No. 33997 (STB served September 20, 2002).

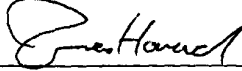
Apparently anticipating that NIR will argue that it is exempt from state and local regulation in the future, the Village cites several cases in which activities conducted by rail carriers were not integrally related to the provision of rail transportation service. As shown above, the transloading operations that NIR will undertake are well within the recognized transloading operations that the Board has found to constitute rail transportation. Moreover, NIR has indicated a willingness to abide by the regulations of the DEC, even though some or all of those regulations might be preempted. Furthermore, the zoning for the property on which NIR will be located in Croton-on-Hudson


specifically allows for rail lines and stations as acceptable land uses, so the issues that exist between Metro, a non-rail carrier, and the Village will not be present when NIR takes control of the property and line. Finally, there is no reason for the Board, in connection with its evaluation of the Notice and the Petition of the Village, to anticipate, much less decide, any preemption issues that are not before it.

For the reasons stated above, the Board should dismiss the Petition and permit the Notice to become effective as scheduled. The Board has before it adequate information to conclude that the class exemption procedures are applicable and should be permitted to operate as intended.

Respectfully submitted,

NORTHEAST INTERCHANGE RAILWAY, LLC


James E. Howard
One Thompson Square
Suite 201
Charlestown, MA 02129
Tel. No. 617-886-9322

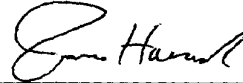


Attorney for Northeast Interchange Railway, LLC

Dated: August 4, 2005

Certificate of Service

I hereby certify that I have caused the foregoing "Reply of Northeast Interchange Railway, LLC to 'Petition of the Village of Croton-on-Hudson to Reject Notice of Exemption or, in the Alternative, for Stay of Effectiveness'" to be served this fourth day of August, 2005 by facsimile and Federal Express on Michael B. Gerrard, Arnold & Porter, 399 Park Ave., New York, NY 10022-4690.



James E. Howard

